

UTILITY CONSUMER PARTICIPATION BOARD

October 6, 2008

MINUTES

A meeting of the Utility Consumer Participation Board was held Monday, October 6, 2008 in the Ottawa Building, 4th Floor Training Room, Lansing, Michigan.

I. Call to Order

Vice Chairman Marc Shulman (participating via conference call) asked Mr. Rose to serve as Acting Chairman for the meeting. Mr. Rose called the meeting to order at 10:12 a.m. Board members present: Ron Rose, Marc Shulman (via conference call), Sister Monica Kostielney, and Harry Trebing. Members absent: Chairman Alexander Isaac. Others present: Michelle Wilsey, LeAnn Droste, Donald Keskey, David Shaltz, Tim Fischer, John Liskey, David Wright and Terri Eklund.

II. Agenda

Kostielney moved, second by Trebing and motion carried to approve agenda with the following amendments:

Addition of the following items under correspondences:

E. Critique of Decoupling (Trebing)

G. Email "Response to Dr. Trebing's questions at the August UCPB meeting" dated 10/2/2008 (Keskey forward from Wright)

H. NREL "Renewable Energy Price Stability Benefits in Utility Green Power Programs" Report (Wright)

I. AARP Case Status Report (Nelson)

J. Kushler Response to Decoupling Critique (Kushler)

K. MEC Budget Request CEC Co U-14701-R/U-15001 (UCRF Grant FY09) (Keskey)

L. FY09 Grants (MEC) – Spent Nuclear Fuels

M. Clarification of grant funding for US Supreme Court appeal for U-13919, Supreme Court Docket 08-246 (Keskey)

N. MCAA Budget Request CEC Co U-15506 including decoupling (Keskey)

O. Grant application of the Ecology Center FY09 (Keskey)

P. MEC/PIRGIM Case Status report 10 6 08;

Transfer of item "MCAA Budget Request CEC Co U-15506 including decoupling (Keskey)" from item F. new business to item B. Old Business; and changing the order of the agenda to take up new business item E: "Clarification of grant funding for US Supreme Court appeal for U-13919, Supreme Court Docket 08-246 (Keskey)" immediately after correspondences.

III. Public Comment

None.

IV. Minutes

Kostielney moved, second by Rose and motion carried to approve the minutes of August 25, 2008 Special Meeting as printed.

V. Correspondences

The following correspondences were received and placed on file:

A. RRC Case Status Report 9/08 (Shaltz)

B. RRC Request for budget revision UCRF 08-02 (Shaltz)

C. Major Actions Summary 8_25_08 (Wilsey)

D. UCRF Financial Report as of 9_29_08 (Eklund)

E. Critique of Decoupling (Trebing)

F. Certiorari petition and appendix filed in the U.S Supreme Court (Keskey)

G. Email "Response to Dr. Trebing's questions at the August UCPB meeting" dated 10/2/2008 (Keskey forward from Wright)

- H. NREL “Renewable Energy Price Stability Benefits in Utility Green Power Programs” Report (Wright)
- I. AARP Case Status Report (Nelson)
- J. Kushler Response to Decoupling Critique (Kushler)
- K. MEC Budget Request CECU-14701-R/U-15001 (UCRF Grant FY09) (Keskey)
- L. FY09 Grants (MEC) – Spent Nuclear Fuels
- M. Clarification of grant funding for US Supreme Court appeal for U-13919, Supreme Court Docket 08-246 (Keskey)
- N. MCAA Budget Request CECU-15506 including decoupling (Keskey)
- O. Grant application of the Ecology Center FY09 (Keskey)
- P. MEC/PIRGIM Case Status report 10_6_08

Trebing commented on his critique of decoupling and the response received under item J. He reiterated his view that decoupling has adverse impacts on residential customers. He noted that Kushler responded that he agreed with Trebing on a number of points regarding the fallacies of decoupling. Kushler goes on to say that he accepts decoupling if it is tied to an energy efficiency requirement for ratepayers. He goes on to say however, that you can’t mandate energy efficiency because utilities have sufficient market power, political clout and they will destroy any program of a mandatory energy efficiency requirement unless tied to decoupling. There is no valid standard that you can get a utility to accept to measure energy efficiency. For example, if the regular required a decrease in real terms of total factor productivity by say four percent a year to get decoupling the utilities would reject it. At the same time, the argument does not examine alternatives to improve net gains to residential customers. Trebing provided further examples that were not considered. He argued that the decoupling case as presented would cause the utility to raise residential rates in support of decoupling and then again raise their rates to support renewables. He discussed the negative impact on efficiency as a result of insulating the firm. He further commented on the new federal tax credit for utilities to adopt renewables and the policies for customers to do the same. He discussed pitfalls of various methodologies. He concluded that while he respects Kushler, Keskey and Crandall, they have not convinced him that decoupling is in the public interest. He would only consider it if the study were able to show clearly that you can reduce “energy efficiency” to a manageable term that everyone can deal with and that it would come up every time you have an Act 304 examination. That is not addressed in this response. On that basis he stated that he remained opposed to UCRF funding an initiative supporting decoupling. Rose commented on the complexity of the issues before the board.

“New Business” E. *Clarification of grant funding for US Supreme Court appeal for U-13919, Supreme Court Docket 08-246.* Keskey explained that in the process of filing the certiorari petition and appendix they exceeded the legal budget. He planned to write off the approximately \$7,000 difference. He prepaid the printing of the reply brief with the existing budget and do not yet know if there is a refund. He plans to file the reply brief and supplemental appendix and response to the opposition filings this week. He would like confirmation from the board that this work would be covered by the grant. The supplemental budget approved by the board on August 25, 2008 was for the merits of the case if accepted. He would like to know if a portion of the funds approved to argue the merits can be used to continue the pre-acceptance phase work. Trebing asked Keskey the estimated amount needed to complete the pre-acceptance phase work. Keskey thought it would be less than \$5000 but could not determine the precise amount.

Wilsey asked if any of the proposed funds would be spent on the \$7,000 of work he referenced that was conducted prior to October 1, 2008? Keskey responded no. The work completed prior to October 1 not covered by the legal budget would be written off. The present request was for work on the reply brief that would commence after today’s meeting. Wilsey asked if he was, therefore, asking for an amendment to the work plan of the existing grant to include drafting of the reply brief and other pre-acceptance phase work? Keskey said he was trying to get coverage for the reply brief which is the pre-merit stage. He indicated that it could be accomplished by granting permission to use up to \$5,000 of the existing budget or grant a budget increase of \$5,000 effective from today. Wilsey asked Droste if she would see any issue in amending the work plan to include work on the reply brief? Droste responded that she did not see any administrative problem with this amendment. Kostielney moved, second by Trebing

and motion carried to approve amendment of the work plan U-13919 appeal. Upon a roll call vote the following voted yes: Kostielney, Rose, Trebing. The following voted no: Shulman. The following were absent: Isaac. Shulman expressed his opposition to the request based on representations by Keskey in previous requests for budget on this case that the amount requested would be sufficient for the work described. While some degree of mis-estimation is reasonable, in this particular matter it seems excessive and on-going. Shulman noted that a reply brief is typical in this type of matter and should have been contemplated in the original budget. A budget should reasonably represent the work to be done or anticipated to be done. Modifications should arise from extraordinary circumstances, not routine matters. He asked Keskey for clarification and Wilsey for history on the guarantees and assurances that this matter was not going to exceed a certain amount of money. Keskey replied that it is difficult when designing a budget to predict either the status of the case or the amount of work that is going to be done on a case as it progresses. He noted that a substantial amount of unspent funds would revert at the end of the fiscal year due to changing circumstances. He further explained that the briefing and preparation of the appendix in this case was very substantial and required various steps and strategies to move the case forward successfully. In his opinion, he demonstrated good faith by working beyond the approved legal budget on a pro bono basis. He feels approving \$5,000 to complete the certiorari process is reasonable. The \$5,000 would be subtracted from work on the merits if the case is accepted. Shulman noted that it was not the specific amount but the conflict with representations by Mr. Keskey made to secure budget amendment approvals that concerned him. Wilsey noted that in previous requests for grant extensions on this particular case, Shulman has specifically asked Keskey if the amount requested was going to be sufficient. Keskey responded affirmatively. Shulman noted that was a key point in formulating his decision for approval. Shulman noted that in order for him to be consistent with his philosophy and based upon Keskey's representations in previous discussions on this matter, he could not support the present budget amendment request. Kostielney suggested that perhaps the board should establish a discretionary emergency fund, if allowed, for circumstances such as this. Shulman commented that while there are instances of "emergencies" arising, this did not seem to fall in that category. He felt that the board's responsibility for oversight is trying to ensure that when people seek grants that they anticipate fully the range of what might be needed for an appeal. That way there can be a robust discussion on the merits of the effort rather than taking everything by increments or on an emergency, piecemeal basis. Kostielney stated that there is a matter of justice when engaging counsel for a case and compensating people for their work. Pro bono should not become a kind of emergency account. Shulman agreed that people should be compensated for their work and expressed his opinion that all of the attorneys involved had been duly compensated for all of the work that they have done.

Keskey noted that his earlier representations on August 4 were generic to the various transfers being made. While he underestimated the need in this case, there will be monies returned back to the fund in other cases. He should have requested the transfer of more funds to this case. However, he did not think the board would not have approved the transfer if it was more than he requested because the board subsequently approved a budget for the case on August 25, 2008. The board has been committed to this effort since it was initiated at the Commission several years ago.

Kostielney noted that the value and merit of the request should be determined separately from the funding amount of the request. Trebing concurred. He noted his original support of this proposal was tied to the extreme importance of dealing with spent nuclear fuel and the precedent that may be set. He indicated support of the proposal in terms of merit.

Rose noted that none of the grantees are clients of the board. The board is the gatekeeper of the fund to be used to advance the interests of the residential ratepayer in these cases. This is a question of proper oversight versus the expenditure of ratepayer money on substantive matters. These are basically discretionary funds that can only be spent within a particular framework. Would it be justifiable to fund a case up to the Supreme Court and then deny \$5,000 to continue work? Keskey made an error. Rose supported the amendment if the correction is within the realm of proper state procedure and legality. Rose questioned how the \$7,000 of pro bono work factored in and discussed whether it could be recovered. Wilsey reminded the chairman that there was a motion on the floor. Shulman noted his schedule constraint and asked the acting chairman to call the question. Rose indicated that he was still seeking information and the discussion should not be limited by individual schedules. Shulman again asked him to call the question. Rose indicated that he was not prepared to call the question until vetting was completed. Shulman called the question on procedural grounds. Rose thanked Shulman for his

questions and participation. Shulman indicated that he would mute the telephone but would continue to monitor the meeting and participate in the vote as part of a roll call.

Wilsey reminded the chairman that there was a motion on the floor. Rose indicated that he wanted to address the matter in two motions. He specifically wanted to find out if there is a mechanism whereby it would be possible to go back and pay for the additional work that was uncompensated. Wilsey explained that the first motion was to amend the grant approved on August 25 to add work on the reply brief for U-13919 appeal to the work plan. There was no increase in funds but use of existing funds for that new purpose. Following the vote, Shulman left the meeting at 11:40 a.m.

Kostielney asked if there was a difference between pro bono and a write-off? Shaltz explained that the term pro bono is a term of art. The State Bar of Michigan does have a standard that attorneys are expected to do a certain amount of pro bono work per year or make financial contributions to public interest and legal services organizations. Most firms have pro bono standards. If you are going to do pro bono work it must meet certain criteria. If a client doesn't pay a bill it is a write-off, not pro bono. Keskey stated that he does not report unpaid work as pro bono work in these cases.

Rose suggested taking a short break. He requested that the AG and DLEG assist the board in considering how to pay for unpaid work after the break. Trebing noted that he wanted to get to the decoupling issue. Liskey noted that the board had previously dealt with payment of retroactive work and it was determined that the board could not compensate retroactively. Rose asked Liskey to inquire with the AG about payment for overexpended units for a defined method of work. It was work that was approved. Kostielney asked if the board voted no on the Keskey request could they request the AG office to supply a brief in the matter? Keskey said they were on the other side of the matter. Liskey noted that the reply brief Keskey will file will oppose the attorney general's position. Keskey noted it was a substantive opposition – the AG would represent the MPSC in the case.

Rose recessed the meeting at 11:47 for a break. The meeting reconvened at 12:07 p.m.

Rose asked if anyone had or if there was a library that had the Michigan Court of Appeals Reporters? He was looking for the case E.C. Nolan Company, Inc. vs. Department of State Highways. Droste left to look for the requested document. Wilsey asked if this was required for a decision at this meeting or if the issue and fact finding could be deferred to a later meeting? Liskey provided a MOA dated 6/21/05. Rose noted it was not an opinion of the attorney general but rather advice of an assistant AG in the consumer protection division. Trebing asked Rose what his objection was? Trebing noted that he had always accepted the MOA as their guideline – the board cannot pay for past work, period. He asked Rose if he could clearly state what he objected to in that policy? Trebing noted that Keskey has these problems. He felt what Keskey ideally wanted was a lump-sum grant to do his work as he sees fit. Trebing supported this requested budget amendment because it is a significant case. He asked for clarification on the problems with the policy on retroactive pay? Rose discussed his argument regarding “units” to balance the equities between the ratepayer and the attorney and its client who are doing the work. Keskey added that there is also the complication of how to design budgets between cases and categories but also fiscal years that do not match case realities. Trebing asked Shaltz if this is a problem that he encountered? Shaltz said that he could not recall a time that he had come to the board to ask for funding above and beyond what was in their authorized budgets. He noted that Keskey has many more cases. Rose asked if the grant budget document said “estimate.” Wilsey pointed out that the document said “proposed” budget.

Wilsey raised the issue that the attorney's represent “clients”. The UCRF provides funds to assist them in their efforts. They are advocating on behalf of their clients' interests, not the board's. She asked Tim Fischer, MEC what the relationship and responsibility of the client organization was in regard to the grants and “write-offs”. Does the organization receiving the grant participate financially in the cases or finance any of the costs above the UCRF grant funds for vigorous representation of their interests? Keskey said no. Fischer responded that they are not absorbing the costs – it is Keskey and Clark Hill. Wilsey asked if the agreements between Keskey and the grantee organizations included a “hold harmless” clause for UCRF funded cases? Fischer responded, yes. Wilsey asked if they invested any funds on behalf of representation of these cases? Fischer responded, no.

Wilsey noted that when AARP brought their 2008 grant proposal forward, the board asked them, or rather suggested that they, participate in funding some of the work since it was their interest and their case. Keskey noted that the client does spend an enormous amount of staff time in meetings, review, monitoring, etc. They do make an internal investment above the administrative fee they receive on each

case. Wilsey stated that she was simply informing the board that they should consider whether they may be applying different standards to different organizations before proceeding.

Rose suggested tabling the matter and preparing a memo to the attorney general that will ask for an opinion on the following: “When a grantee is rendering services that the grantor has already approved, is it impermissible for the grantor to pay for units of an identified and approved service that exceeds the budgeted amount of the grant without agreement, without benefit of a contract amendment or contract – without benefit of an approved contract amendment by the grantor.” Rose requested that impermissible be changed to impermissible/illegal. Rose moved, second by Kostielney and motion carried to table the issue of payment for write-off expense in the case of U-13919. Kostielney noted that a second was not needed to table an item.

Kostielney requested discussion/clarification on the issue of working at cross-purposes on the same case that was raised in the meeting. Shaltz noted that the attorney general has several divisions that represent different clients. In the earlier discussion, the division opposed to Keskey represents the Commission. Liskey’s division represents ratepayers. The AG staff representing the Commission are not funded by Act 304. Trebing noted the office is “split”. One division represents the consuming public in general, the other defends the residential customer specifically.

VI. Old Business

A. 2009 Ecology Center grant application – Keskey summarized the grant proposal submitted by the Ecology Center and reviewed at the August 25, 2008 special meeting. He further explained the purpose and merits of the proposal. He noted that they attempted to respond to the questions raised by Trebing at the last meeting and provided an article in support of their views. Keskey presented positive arguments regarding the proposal’s fit within the scope of Act 304. Trebing asked Keskey to summarize the amount of the request, how Mr. Wright and he would propose to use the funding, and what his fee would be for participating. Keskey responded that the overall grant was for \$60,600. \$600 for the administrative fee, \$30,000 for legal and \$30,000 for expert testimony. Trebing asked if \$30,000 legal was Keskey’s fee. Keskey responded yes, at \$180 per hour. Trebing asked if Wright would be the expert witness. Wright said that would be a possibility, though others may be called as well. Keskey indicated that experts listed include Geoff Crandall and Jerry Mendel as well as Wright. Trebing commented that he has no problem with renewables. His concern is that they are getting an incentive because of inadequate regulation at the federal level. He further questioned the long-term independence of renewables citing the purchase and development of wind by the utilities. Trebing expressed appreciation of the concept of the proposal, which is to get competitive bids to bring renewables sources in as a constraint on price dominance, as a benefit to the public and the environment. However, he question how effective the witnesses would be in refuting the argument of Detroit Edison or any utility. He suggested reallocating the budget to bring in top notch experts to address questions of the structure of the industry and how this proposal would intend to address it. A city like Ann Arbor has a unique opportunity to really bring about a new option for power if the problems are addressed.

Keskey noted that the budget is designed to address a substantial amount of legal work required to establish a new client in a case. He also noted the budget could always be adjusted as the case proceeds. Trebing noted that there is a need for legal representation but he would like to see more addressed in supporting the renewable analysis that could pay off substantially for residential customers. Wright noted that the study provided samples of voluntary programs. He cited some other work that had been done in other states on how you integrate renewables, such as wind, at high penetration levels in the utility mix and what that means for costs such as balancing and other ancillary services. While it was outside of the scope of the intervention they were proposing here, Wright suggested that a Michigan-wide study of what the cost would be for Michigan to get to a 20 percent renewables and to have that be a part of the mix and what that would mean for ratepayers would address the concerns Trebing raised. Trebing commented that the report did a nice job addressing backup services. Trebing commented that the results may demonstrate that there may be times when the renewable source can really benefit the system and the utility should be paying a premium for this. Wright explained that they want to investigate some of these issues through the PSCR case and where the utility gets their resources from and whether it would be possible to integrate renewables into the mix to avoid costs for MISO purchases and calls for example. Trebing questioned if the resources in the budget would allow them to do the work. He suggested reallocating the legal fees to expert analysis. Keskey noted that they could raise the budget for experts or

restructure the budget when they learned what happened. Wright noted that they would be willing to work on a detailed proposal but he could not give a reasonable estimate of the cost involved with that at this time. Liskey commented that, to the extent that whatever is developed leads to specific rate design matters, it is more likely to be considered by the Commission as Act 304.

Rose commented extensively on the scope of this undertaking and requested far more deliberations to determine if the board should proceed with funding and if Act 304 contemplates this matter. Wilsey questioned whether this should be pursued/or would be deferred by the Commission to the newly created annual energy optimization and renewable filing. Keskey responded that you do not know until you proceed and get some guidance. Rose suggested the proposal be withdrawn until additional details of a work plan and budget are developed. Trebing again expressed support of the concept but reiterated the need to develop a more specific proposal.

Kostielney noted that the board may want to pursue an education session on the economic, political, legal, social and cultural aspects of the issues they are discussing prior to making a decision on this proposal.

Wright acknowledged the very broad questions regarding the Ecology Center's proposal. Ratepayers in Ann Arbor have been looking at ways to hedge their energy costs for years. This applies to ratepayers across the State of Michigan. The Ecology Center believes a way to do this is with renewable resources. So they are looking for ways, as a customer, to work with their regulated utility to actually develop this rate, and the only opportunity to do that is to intervene in a PSCR case. That is where funds are provided to do that. There was additional discussion of the proposal but no action was taken.

VII. New Business

A. Energy Michigan Meeting – No discussion.

B. MEC Budget Request CECU U-14701-R/U-15001 (UCRF Grant FY09) – Keskey reported that the appeal had been filed and he was requesting that the grant and budget originally requested be approved. The core issue relates to the proceeds of the sale of SO2 allowances and the allocation of costs for acquisition of additional allowances identified in their forecast. Another issue is the double collection of a special fee that was in effect for 15 years for the Federal Decontamination and Decommissioning Fund. Wilsey asked for clarification on the amount requested. A previous grant for the filing of the appeal in the amount of \$875 was approved. Keskey noted that the filing occurred before the grant took effect so he utilized funds from the FY08 budget. The FY09 grant for \$875 toward filing fees would not be needed. He instead was asking that the grant be awarded in the total amount of \$12,726 for work on the appeal. **Kostielney moved, second by Trebing and motion carried to approve MEC Budget Amendment Request for CECU U-14701-R/U-15001 appeal to increase the budget to a total of \$12,726.**

C. MCAA Budget Request CECU U-15506 including decoupling – Keskey noted that the Board had previously approved a budget for Consumers Gas Case U-15506 in February 2008. Under that budget, testimony of three experts was filed. Hearings start Thursday. He argued that the new statute expressly provides for decoupling and also provides for energy efficiency. He felt the question is whether the safeguards raised by Trebing would be benchmarked into the case? Witnesses would have to be present to testify or their written testimony would not be recognized. They want to participate in the formulation of decoupling in the interest of residential ratepayers. Part of the budget will lapse because of the extension of the case into the new fiscal year. He noted that a new issue is that Consumers Power included a request for coverage of annual letters of credit at the cost of a million dollars a year to cover the cost to guarantee that Consumers will pay for nuclear waste. This is a gas case. They also included in the capital structure a portion of the \$170 million in interest that the ratepayers already paid for spent nuclear fuel fees before 1983 that Consumers never paid to the Federal government. The letters of credit are to cover the cost of Consumers performing with our funds, which they have already had. In addition they have included as a debt cost the cost of that \$170 million of debt which has already been paid. Our witness William Peloquin, argues that it should be zero cost, not a cost of debt. Keskey argued that the amount of continuation funds requested is less than the amount of funds that would lapse. **Kostielney moved, second by Rose and motion failed (2 yes, 1 no) to approve the MCAA budget request in the total amount of \$15,655.**

D. RRC Budget Amendment Request – Shultz requested a reallocation of funds with the existing

budget for grant 08-02. This request did not involve additional funds or modifications to the work plan. It realigns the case budgets to more closely match the case requirements. **Rose moved, second by Kostielney and motion carried to approve the following budget amendments to RRC 08-02: MGU U-15450 decrease expert to \$5,760, decrease legal to \$10,620, decrease admin to \$163.80; MIcon U-15451 increase expert to 15390, increase legal to \$17100, increase admin to \$324.90; SEMCO U-15452 decrease expert to \$6480, decrease legal to \$10530, decrease admin to \$170.10; CEC Co U-15454 increase expert to \$20,520, increase legal to \$21,600, increase admin to \$421.20.**

Kostielney commented on the efficiency, structure and use of time in board meetings. Rose requested that this item be added to the agenda for the next meeting. Kostielney left the meeting. Deadlines for submission of materials and agenda requests would be set for the next meeting.

VIII. Next Meeting

The next regular meeting is scheduled Monday, December 1, 2008, 10:00 a.m., Ottawa Building, 4th Floor Training Room.

IX. Adjournment

The meeting adjourned at 2:05 p.m.

Note: Complete transcripts of this meeting are available upon request.